

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	WC Docket No. 05-068
Regulation of Prepaid Calling Card Services)	

**IDT TELECOM, INC.’S OPPOSITION TO
AT&T EMERGENCY PETITION FOR IMMEDIATE INTERIM RELIEF**

IDT Telecom, Inc. (“IDT”), through its undersigned counsel, hereby submits this Opposition to the AT&T Emergency Petition for Immediate Interim Relief filed in the above-captioned docket on May 3, 2005.

A traditional example of “*chutzpah*” is the boy who murders his parents, and then asks the court for leniency because he is an orphan. AT&T has come up with a new twist on this tale—asking the court to round up all the other orphans in town on suspicion that they too may have killed their parents. This is a transparent attempt to divert the Commission’s attention from AT&T’s own actions to other parties, which the Commission should reject.

1. There is No “Emergency” Facing the Commission.

AT&T improperly suggests that the Commission should adopt wide-ranging rules, without notice or opportunity for comment, to forestall a supposed “emergency.” Its own Petition, however, makes clear that there is no emergency. Everything that AT&T complains about in its Petition is a consequence of Commission policies that have been in place for years. The only

“emergency” is one created by AT&T itself, by engaging in an aggressive interpretation of regulatory policy, which the Commission has now rejected.¹

The APA permits the Commission to adopt rules without prior public notice only when the notice and comment procedure would be “impracticable, unnecessary, or contrary to the public interest.” 5 USC § 553(b). This is “essentially an emergency procedure,” and “should be interpreted narrowly ... so that the exception will not swallow the rule” *Buschman v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). “[T]he exceptions should be invoked only in emergency situations when delay would do real harm. ... Bald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures.” *Action on Smoking and Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983).

[The] notice rule serves an important interest, the right of the people to present their views to the government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people In our opinion, therefore, the 30-day comment period should be closely guarded and the 'good cause' exception sparingly used.

Kelly v. United States Dept. of the Interior, 339 F. Supp. 1095, 1102 (E.D. Cal.1972).

The only justification AT&T offers for the adoption of its proposal without notice or comment is the “avoidance of market disruption,” Petition at 6, quoting *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local exchange Carriers*, 19 FCC Rcd. 16783, para. 20 (2004). This citation is inapposite, however. The interim rules adopted in the *Unbundled Network Elements* case were intended to maintain the *status quo* on a temporary basis until permanent rules could be developed. AT&T’s proposal, by contrast,

¹ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket Nos. 03-133 and 05-68, FCC 05-41 (rel. Feb. 23, 2005) (“*Prepaid Card Order*”).

would substantially alter the *status quo*, impose new and ill-defined obligations on numerous entities, and cause rather than avoid market disruption.

As shown below, the problems identified by AT&T in its Petition, to the extent they are real, are neither novel nor are they caused by the *Prepaid Card Order*. Rather, they are problems that existed before AT&T chose to file the Petition for Declaratory Ruling that led to the *Prepaid Card Order*. AT&T elected its remedy, and it should not be permitted to use procedural shortcuts to seek a different remedy that it now thinks would have been more appropriate in the first place. Further, the Commission should not dispense with notice and comment to adopt rules that may have dramatic and unknown consequences for the public interest.

2. The Problems That AT&T Proposes to Address by “Interim” Rules are Actually of Long Standing, and Were Known to AT&T Before It Sought a Declaratory Ruling

AT&T complains that the *Prepaid Card Order* has “skewed the regulatory regime and has created uncertainty and asymmetries” Petition at 2, implying that the relief it seeks is somehow made urgently necessary by the Commission’s most recent ruling on AT&T’s own request for declaratory relief. This is nonsense. As other parties have observed in comments filed in this docket in response to the Notice of Proposed Rulemaking, the real problem underlying AT&T’s grievances is an outdated, arbitrary, and Byzantine system of inter-carrier compensation rules.² The Commission has been aware of the problems with this system at least since 2001, when it opened CC Docket No. 01-92 to reform these rules. AT&T tried to find a way around the rules, but the Commission ruled against it. The *Prepaid Card Order* did not create a new problem; it simply rejected AT&T’s attempt to find a loophole in the existing rules.

² See, e.g., Comments of MCI Corporation at 2, Comments of SBC Communications, *passim*, WC Docket No. 05-68 (filed April 15, 2005).

Now AT&T claims that since it lost its argument, the Commission should immediately change the rules—for prepaid calling cards only—so that every other carrier in this segment of the market can share AT&T’s pain. The fact that AT&T now has to comply with these long-standing inter-carrier compensation rules—even if AT&T’s attacks on the merits of the rules were correct—would not constitute an “emergency” that requires an immediate and ill-considered response.

Furthermore, AT&T knowingly took the risk of an “unlevel playing field” when it chose to file a petition for declaratory ruling. The Commission has made it abundantly clear that, under its current rules, it determines whether particular services are “information services” on a case-by-case basis.³ AT&T chose to pursue this case-by-case approach, which inherently requires that services falling on opposite sides of a regulatory dividing line will receive different benefits and obligations. It did not seek a rulemaking to eliminate the disparity in regulatory treatment between these different categories of services. AT&T thought it would benefit from an unlevel playing field by having its offerings declared to be information services. Only now that it finds itself on the wrong side of the field does it perceive an “emergency” need to change the rules.

3. The Extensive and Burdensome “Interim” Rules Proposed By AT&T Should Not Be Imposed Without Notice and Comment.

Even if there were an “emergency” other than one of AT&T’s own making, the measures that it proposes to deal with the “problem” are far too drastic to be adopted without adequate consideration of their potential impacts on the industry and on users of prepaid card services.

Although AT&T’s proposal is lacking in details, even the broad outline presented in the Petition demonstrates that it would be highly disruptive and burdensome (largely to AT&T’s

³ See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, 13 FCC Rcd 11501, ¶¶ 3, 14, 55, 83, 90, 105 (1998) (“Universal Service Report”).

competitors, which likely is the point). *First*, AT&T proposes that the Commission impose universal service contribution obligations on all prepaid card services *even if* they are properly classified as information services, a step that the Commission previously has expressly rejected.⁴ *Second*, it asks the Commission to change the access charge rules, either by (a) declaring all prepaid calling card traffic jurisdictionally interstate, or (b) subjecting all prepaid calling card traffic to both interstate and intrastate access charges, *even if* they are properly classified as enhanced services, thereby changing the long-standing rule that only common carrier communications services are subject to access charges.⁵

Both prongs of AT&T's proposal would not only change existing substantive requirements, but impose substantial compliance burdens on entities required to comply with them. AT&T proposes to impose universal service contribution obligations on services that have previously been exempt from them, which would require sellers of these cards to change existing accounting procedures, and perhaps to reprice their services as well. AT&T offers no information whatsoever on the cost or other impacts of its proposals, or whether the benefits to the universal service fund would outweigh the costs of the expanded contribution obligation. It also suggests that the commission could exempt "prepaid card services sold by, to, or on behalf of military exchanges or the Department of Defense." (Petition at 9.) Again, there is no information in the record as to the financial effect of the proposed exemption, or how it would affect the market. For all the Commission knows, AT&T may have an exclusive contract to supply calling

⁴ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, para. 788 (1997); *see also* Universal Service Report, *supra*.

⁵ *MTS and WATS Market Structure*, 97 FCC 2d 682, 711-715 (1983) (neither enhanced service providers nor private networks are subject to access charge rules); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988) (declining to change treatment of enhanced service providers as end users); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 21354, 21478 (1996) (maintaining current treatment of enhanced service providers), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

cards to the military exchanges, so that this exemption would benefit only AT&T at the expense of its competitors. This type of unintended consequence illustrates the danger of AT&T's suggested rush to adopt rules blindly, without an adequate record, and without a full opportunity for interested parties to present the facts to the Commission.

Likewise, AT&T's proposal to alter the long-standing access charge rules for enhanced services is fraught with unknown potential consequences. If AT&T's first alternative is adopted (treating all card services as interstate), both card providers and local exchange carriers will have to find some way to distinguish these calls from all other access traffic so that they do not incorrectly assess or pay intrastate access charges on prepaid card traffic. The Commission has no information whatsoever as to the cost or difficulty involved in this. Under the second alternative, existing enhanced services that have been developed and marketed in reliance on the Commission's current rules would have their cost structures drastically changed with little notice, and again the Commission has no way of determining whether the benefits of the interim rules will exceed the costs imposed on these services.

In either case, AT&T acknowledges that its proposal will require the Commission to impose extensive and inevitably costly reporting and certification requirements on all prepaid card providers. (Petition at 18-19.) Once again, the record is devoid of any information about how much these compliance burdens will cost, or how these increased costs may be passed through in higher prices to consumers. It is simply irresponsible of AT&T to ask this Commission to impose new costs and burdens on an entire industry without any idea whatsoever of the consequences of its actions.

CONCLUSION

For the foregoing reasons, the Commission should dismiss AT&T's Emergency Petition for Immediate Interim Relief.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing Opposition were served by first-class mail, postage prepaid, upon the persons listed below, this 13th day of May, 2005:

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